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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 409.

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a corporation,

Petitioners,

v.

A. J. SIMLER,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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Of Counsel.

Dated October 14, 1955.

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Respondent's brief displays such a misunderstanding of the issues, and involves such errors and omissions, as to require this brief reply.

What is here involved is a direct conflict between State and Federal courts in a purely probate matter, in which we submit the prior jurisdiction of the State courts over the estate should be respected. That conflict still exists, and is acute. By the Federal judgment here sought to be reviewed, the State probate jurisdiction has been ousted, and the petitioner executor and his counsel have been placed in the intolerable position of being ordered to violate a distribution decree of the State court, with the real danger of contempt if they obey either of the conflicting Federal and State decrees.

Respondent's brief attempts to convey two wholly erroneous impressions:

(1) that petitioners are now trying to relitigate matters already adjudicated on the former petitions (No. 677, Oct. Term 1953, 347 U. S. 954, and No. 510, Oct. Term, 1954, 348 U. S. 929), and

(2) that the controversy in some way has become moot.

(1) We are attempting no such relitigation of adjudicated issues.

On both former petitions, the ultimate question was whether a residuary devise of land to a charitable corporation was valid or not under Oklahoma law. The Court of Appeals held it invalid, and declared that the land passed by intestacy. Nothing else was, or could have been, adjudicated.

On the present petition, the wholly different question is presented as to whether a Federal court can decree that debts, administration expenses and cash legacies shall be paid in a manner which is both flatly contrary to an outstanding prior State court decree and directly forbidden by the explicit terms of an applicable State statute. That question had not arisen and was not considered or decided on either of the two former petitions. It is not argued, and the applicable State statute is not even cited, in respondent's present brief.

(2) The case is emphatically not moot.

At least six times in their brief, respondent's counsel erroneously assert that the estate "has been distributed" and that the State probate court has in some way become *functus officio.*

Thus at pages 8-9 respondent's counsel assert:

> "The distribution of the farm and runs was made by the County Court of Oklahoma County on November 30, 1954, in which Distribution Order the Court said in part (Transcript of Record, Circuit Court, Page 15):
>
> 'IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Estate remaining on hand should be and is hereby distributed as follows:
>
> "To A. J. SIMLER, the following described real property:
>
> 'Northwest Quarter of Section 34, Township 6 North, Range 10 West, in Caddo County, Oklahoma * * *' ",

so when the judgments were entered by the Circuit Court of Appeals on June 27, 1955, and by the District Court on July 18, 1955 (Appendix 1, 2, 3 and 4, this brief), the farm and runs had been distributed by the County Court. The County Court has no control of said property on said distribution thereof to A. J. Simler."

What the probate court actually did was to award to respondent Simler

> "Northwest Quarter of Section 34, Township 6 North, Range 10 West, in Caddo County, Oklahoma, and all income therefrom from and after July 13, 1952 [the date of testatrix's death] *after payment of all debts, expenses of administration, including taxes, and all legacies with accrued interest*" (Italics ours.) (R. 15; App. B. to petition, p. 11b).

The whole controversy on the present petition arises out of the words above italicized. Their omission by respondent's counsel indicates either unwillingness or inability to meet the basic issue.

We say that the State court alone had jurisdiction to determine how debts, administration expenses and cash legacies should be paid, and that the italicized words in its decree were absolutely required by the mandatory terms of the State statute cited at page 3 of our petition.

It is precisely because the Court of Appeals disregarded the State law and decreed a distribution flatly contrary to those italicized words that we now ask certiorari. It is precisely because of that Federal decree that the estate remains undistributed and the executor stands in peril of contempt no matter what he does.

Nowhere in their brief do respondent's counsel allude to the fact that their client now has outstanding an appeal from the italicized portion of the State court decree, or to the fact that the Federal judgment which we seek to review has enjoined our clients from opposing that appeal, and has thus made impossible an orderly disposition by the State appellate courts of a matter which is purely one of State law.

In the Appendix to their brief respondent's counsel set forth the judgments that have been entered in the District Court pursuant to the judgment of the Court of Appeals which we seek to review. At pages 9-10 of their brief they seem to argue that because one of those judgments (their Appendix 5, p. 18) has been paid, this Court is in some way deprived of jurisdiction to grant certiorari. There is no substance to any such argument.

> *Dakota County* v. *Glidden*, 113 U. S. 222, 224;
> *Porter* v. *Lee*, 328 U. S. 246, 251;
> *O'Hara* v. *MacConnell*, 93 U. S. 150, 154.

We submit that certiorari should be granted to resolve the existing conflict between the State and Federal decrees,

and to restore to the State courts the probate jurisdiction wrongfully assumed by the judgment of the Court of Appeals for the Tenth Circuit.

Dated: October 14, 1955.

Respectfully submitted,

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